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IN THE

Supreme Court of the United States

October Term, 1958.

No. 369

R. H. MACY & CO., INC., L. BAMBERGER & CO., DAVISON-PAXON CO., and THE J. ASSMANN & KOCH COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 15, 1958.

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R. H. Macy & Co., Inc., L. Bamberger & Co., Davison-Paxon Co. and The LaSalle & Koch Company [Macy] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this action May 12, 1958.

Opinions Below

The opinion of the district court (R. 32a-55a; App. 18-40) is reported at 148 F. Supp. 377. The opinions of the court of appeals reversing the judgment of the district court (R. 67b-78b; App. 1-12) and denying Macy's petition for rehearing (R. 129b-131b; App. 14-16) are reported at 255 F. 2d 884.

Jurisdiction

The judgment of the court of appeals was entered May 12, 1958 (R. 79b; App. 13). Rehearing was denied June 10, 1958 (R. 130b; App. 17). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

Where Congress accords a statutory right to a class of persons, to be exercised pursuant to a regulation to be prescribed by a responsible agency officer, and that officer

(1) prescribes a regulation containing, *inter alia*, a cut-off date for the exercise of the right;

(2) until long after the cut-off date, interprets the statute and the regulation to deny the right to a part of the class; and

(3) thereafter, his interpretation of the statute having been held to be erroneous, reinterprets the regulation to accord the right to the entire class:

A. Had the officer, prior to reinterpretation, actually prescribed a regulation as to the originally excluded part of the class for exercise of the right accorded it by Congress?

B. Can the officer, after reinterpretation, validly invoke the cut-off date as to the originally excluded part of the class to deny it the right accorded by Congress?

Statutes and Regulations Involved

The statutes, regulations and rulings involved are set forth in the Appendix, pages 63-88.

Statement

This petition seeks review of a judgment denying Macy refund of federal income and excess profits taxes for fiscal 1942, with interest, in the amount of $1,008,750.21.

Although the decision of the court below is directed specifically to fiscal 1942, it necessarily has the effect of invalidating like claims for refund by Macy for fiscal years 1943 through 1947, which aggregate approximately $11,000,000.

Macy brought this action on October 26, 1954, in the United States District Court for the Southern District of New York. (R. 1a.) The basic facts in the case are not disputed, being agreed upon and stipulated by the parties. (R. 3a-31a; App. 41-62.) Those facts and pertinent statutory and administrative materials show:

1. The Purpose of LIFO in Federal Tax Accounting.

Steadily rising prices and depreciating currency values in the years immediately prior to World War II, prompted Congress in 1939 to amend the elective inventory provision (Section 22(d)) of the Internal Revenue Code of 1939, 53 Stat. 863 *et seq.* [Code]. Amendment was necessary so that all taxpayers (not merely producers and processors of certain nonferrous metals and tanners of hides and skins, as previously) could elect, if they so desired, to abandon a way of valuing inventory called FIFO, and adopt a new anti-inflation valuation called LIFO.

FIFO and LIFO are accounting techniques for valuing inventories. FIFO presumes that the first goods purchased are the first goods sold. LIFO, on the other hand, presumes that the last goods purchased are the first goods sold.

During a period of rising prices, the cost of goods sold is lower under FIFO, with the result that gross profit on

sales is greater. Conversely, under LIFO the cost of goods sold is higher during such a period and the gross profit on sales is lower. The reverse situations obtain in a period of falling prices. Thus, in comparison with FIFO, LIFO results in reporting a smaller gross profit during a period of rising prices and a larger gross profit during a period of falling prices.

2. The Retail Method and FIFO and LIFO.

The so-called retail method of inventorying determines inventories in terms of the aggregate of the retail selling prices of stock on hand rather than in terms of specific items of merchandise. Macy and most other retailers (with the sanction of the Commissioner under the general inventory regulation*) long have used the retail method in determining inventories for federal tax computation.

Both the FIFO and LIFO accounting techniques are applicable to the retail method of inventorying. The retail method, without more, automatically results in a FIFO valuation. To clearly reflect income and use the LIFO technique with the retail method, it is necessary (1) to inventory by departments within a store and (2) to adjust the closing inventory of each department by applying a price index to its aggregate retail value.**

3. The Original LIFO Statute.

Section 22(d) of the Code, as amended in 1939, provided that

> "(1) A taxpayer may use [LIFO] . . . in inventorying goods specified in an application [to use LIFO, as] required under paragraph (2) . . .

---

*Regulations 103, Sec. 19.22(c)-8. (App. 65-67.)

**For a fuller discussion of FIFO and LIFO, the retail method of inventorying and why departmental inventorying and price indices are necessary to the use of LIFO with the retail method, see *Hutzler Brothers Company*, 8 T. C. 14, 15, 23-27 (1947) and Mim. 6244, 1948-1 Cum. Bull. 21 (App. 83-88).

"(2) . . . [LIFO] may be used—

"(A) only in inventorying goods . . . specified in an application to use such method filed at such time and in such manner as the Commissioner may prescribe; and

"(B) only if the taxpayer establishes to the satisfaction of the Commissioner that the taxpayer has used no procedure other than [LIFO] . . . in inventorying (to ascertain income, profit, or loss, for credit purposes, or for the purpose of reports to shareholders, partners, or other proprietors, or to beneficiaries) such goods for any period beginning with or during the first taxable year for which the method described in paragraph (1) is to be used.

"(3) The change to, and the use of, [LIFO] . . . shall be in accordance with such regulations as the Commissioner, with the approval of the Secretary, may prescribe as necessary in order that the use of such method may clearly reflect income." 53 Stat. 877.

The Commissioner interpreted "goods" in Section 22(d) as requiring that inventories, to be eligible for LIFO treatment, be recorded in terms of physical items. Since, under the retail method, inventories are recorded only in terms of aggregate retail selling prices, the Commissioner, shortly after the 1939 amendment, took the position that the statute did not authorize retail method taxpayers to use the LIFO technique. (Pars. 7-8 of Stipulation of Facts, R. 8a, 9a; App. 46, 47.)

4. The Original LIFO Regulation.

Pursuant to the statutory direction that the "change to, and use of [LIFO] be in accordance with such regulations as the Commissioner . . . may prescribe", the Commissioner, in December 1939, promulgated the original

LIFO regulation. T. D. 4959, 1940-1 Cum. Bull. 22; Reg. 101, Arts. 22(d)-1 to 22(d)-6.* That regulation required, as a condition precedent to the election of LIFO, the filing of an application specifying the goods to which that inventory valuation technique was to be applied. Consistent with his interpretation of the LIFO statute, the Commissioner intended and interpreted the regulation to deny taxpayers using the retail method the right to elect LIFO (Paragraph 7 of Stipulation of Facts; App. 46-47.). Thus, he included in the original LIFO regulation a requirement for the matching of goods (Regs. 103, Sec. 19.22(d)-2; App. 69-74) with which retail method taxpayers could not comply and failed to include in that regulation provisions requiring the inventorying of goods by departments and for the use of price indices to adjust the retail method inventory to LIFO.

5. The 1942 Amendments to the LIFO Statute and Regulation.

Original subsection 22(d)(2)(B) of the Code denied an election of LIFO to taxpayers who, in the taxable year for which they wished to exercise their right to elect LIFO, had issued *interim* and or *annual* financial reports on a FIFO basis. In 1942, Congress amended that subsection retroactively to 1939, to deny such election only to taxpayers who, in such taxable year, had issued *annual* financial reports on a FIFO basis.

Shortly after that amendment of the statute, the Commissioner amended the original LIFO regulation to deal with taxpayers who, for all or part of the period 1939 to 1942, had been ineligible to elect to use LIFO only because they had published interim financial reports on a FIFO basis. Subsection 19.22(d)-3 of the original LIFO regulation, entitled *"Time and Manner of Making Election"*, was amended to read:

*Arts. 22(d)-1 to 22(d)-6 were adopted without amendment as Reg. 103, Sections 19.22(d)-1 to 19.22(d)-6. These Sections were amended by T. D. 5163, 1942-2 Cum. Bull. 80; T. D. 5400, 1942-2 Cum. Bull. 81; and T. D. 5605, 1948-1 Cum. Bull. 16 (App. 68-83)

> "[LIFO] . . . may be adopted and used only if the taxpayer files with his return for the taxable year as of the close of which the method is first to be used (or, if such return is filed prior to March 10, 1943, [*i.e.*, returns for the years 1939-1942] the ninetieth day after the approval of Treasury Decision 5199, then at any time prior to such date), in triplicate on Form 970 (revised), and pursuant to the instructions printed thereon and to the requirements of this section, a statement of his election to use such inventory method. . . ."

6. The Tax Court Holds That Section 22(d) of the Code Permits Retail Method Taxpayers to Elect LIFO.

By March 10, 1943, no more than seventy retail method taxpayers had filed, with their income tax returns for fiscal 1942, Treasury Form 970, seeking to elect LIFO (Par. 9 of Stipulation of Facts, R. 9a; App. 47). The Commissioner, of course, immediately denied the right of those taxpayers to elect LIFO. In 1947, a case that had been brought by one of those seventy was concluded adversely to the Commissioner. *Hutzler Brothers Company*, 8 T. C. 14 (1947). In that decision, which the Commissioner accepted without appeal, the Tax Court held retail method taxpayers not to be precluded from electing to use LIFO as permitted by Section 22(d) of the Code.

The breadth of the original LIFO regulation was not in issue in the *Hutzler* case. The sole issue there was the scope of the LIFO statute. However, in support of its contention that the LIFO statute did not apply to retail method taxpayers, the Government argued that the LIFO regulation clearly excluded retail method taxpayers and that the regulation was strong evidence of the meaning of the statute. The Tax Court, in answer, briefly adverted to the original LIFO regulation, stating that the Government's

". . . principal reliance, the interpretative regulations, will not withstand examination. . . . All of the regulations are as consistent with petitioner's position as they are with that of respondent. See, e.g., Regulations 103, secs. 19.22(c)-8 and 19.22(d)-3. It is simpler and more rewarding to seek the meaning of the statute itself than of ambiguous and largely irrelevant administrative interpretations." (8 T.C. at 28)*

7. The 1948 Amendments to the LIFO Regulation.

After the decision in *Hutzler*, the Commissioner in 1948 amended the LIFO regulation to make it applicable for the first time to retail method taxpayers (T. D. 5605, 1948-1 Cum. Bull. 16; App. 79). By those amendments, the Commissioner made provision (1) to inventory by departments within a store and (2) to adjust the closing inventory of each department by applying a price index to its aggregate retail value. The Commissioner also amended portions of the original LIFO regulation, with which retail method taxpayers could not comply, to exclude such taxpayers from their operation (App. 79-82).

The Commissioner, when promulgating the amendments, explained that

". . . [his] regulations with respect to . . . [LIFO] have heretofore made no provision for re-

*The Government, since *Hutzler*, has always contended that

". . . It was there [in *Hutzler*] successfully urged that the existing regulations, augmenting Section 22(d) of the 1939 Code, did not exclude department store retailers from adopting LIFO. Upholding this contention, the Tax Court did not invalidate the regulations." (Brief for Respondent, *Kaufman and Baer Co. v. United States*, No. 212, October Term, 1956, p. 11).

That erroneous reading of *Hutzler's* discussion of the original LIFO regulation was accepted by the court below [see R. 72b, 73b; App. 67]. When in *Joseph Horne Co. v. United States*, 161 F. Supp. 580 (Ct. Cl. 1958), the Government again advanced this contention as to the scope of the holding in *Hutzler*, its contention was expressly rejected. See R. 95b, 96b.

> tailers to group such goods into classes. The Bureau has held that the use of . . . [LIFO] was not available to taxpayers whose inventory records are kept on the basis of the retail inventory method permitted under . . . section 19.22(c)-8 of Regulations 103." (Mim. 6244, 1948-1 Cum. Bull. 21).

He also stated that the 1948 amendments to the LIFO regulation were made

> ". . . in order to adapt the retail inventory requirements of the regulations to the . . . [LIFO] inventory principle of Section 22(d) of the Internal Revenue Code as enunciated by the Tax Court of the United States in *Hutzler Bros. Co.*, (8 T. C., No. 3 [page 14])." (T. D. 5605, 1948-1 Cum. Bull. 16).

Those amendments were specified to be retroactive to all taxable years beginning after December 31, 1938.

8. The Commissioner Disallows the Macy LIFO Election and Claim for Refund at Issue in this Case.

Fiscal 1942 was the first year for which Macy qualified under the financial report requirements of Section 22(d)(2)(B) of the Code. As early as February 1942, Macy and other retailers, as well as representatives of the National Retail Dry Goods Association, had conferred with highly placed representatives of the Bureau of Internal Revenue in an effort to persuade the Commissioner to permit use of LIFO by Macy and other retailers. The conversations were unsuccessful and the Commissioner persisted in his adverse interpretation of the LIFO regulation. Macy did not file a Treasury Form 970 prior to March 10, 1943.

However, promptly after prescription of the 1948 amendments to the LIFO regulation, Macy did file Treasury Form 970, an amended return under LIFO for fiscal 1942 and the claims for refund at issue in this case.

In 1951, the Deputy Commissioner recommended that Macy's right to use LIFO, beginning with fiscal 1942, be recognized and, pursuant to that recommendation, the Internal Revenue Agent in Charge issued Revenue Agent Reports allowing LIFO to Macy for fiscal 1942.

Despite those actions by the Deputy Commissioner and the Internal Revenue Agent in Charge, the Commissioner in 1954 ruled that the omission by Macy to file Treasury Form 970 prior to March 10, 1943, barred its claim for refund. In so doing, the Commissioner rejected the position which he had maintained prior to 1948, that, since the original LIFO regulation (including "*The Time and Manner of Making Election*" subsection, which provides for filing Treasury Form 970) had been inapplicable to retail method taxpayers, those taxpayers had no authority or obligation to file Treasury Form 970 and their omission to do so was of no consequence.

9. Macy Brings the Instant Action.

On October 26, 1954, Macy sued the United States in the United States District Court for the Southern District of New York for the refund denied by the Commissioner. On cross-motions for summary judgment, based on stipulated facts, the district court on February 4, 1957 entered judgment for Macy. The United States appealed from that judgment and, on May 12, 1958, the court below reversed.

In both the district court and the court of appeals the Government rested its position on a single argument. It contended that, despite the inflexible position of the Commissioner until prescription of the amended LIFO regulation in 1948 that LIFO was not available to retail method taxpayers, the LIFO regulation had always prescribed the time and manner in which such taxpayers must elect to use LIFO.

The district court rejected that contention holding that, for purposes of deciding whether a retail method taxpayer had a right of election in the period 1942-1948 under the LIFO regulation, a court must attribute to the LIFO regulation the same meaning that the Commissioner in 1942-1948 intended and interpreted it to have. Specifically, the district court held that the "*Time and Manner of Making Election*" subsection of the LIFO regulation (subsection 3 of Section 19.22(d)-1) cannot be construed to have permitted a retail method taxpayer to elect LIFO at a time when the Commissioner was construing that subsection and every other subsection of the regulation to bar such an election. The district court thought it absurd for the Government to ascribe to the Commissioner

> "... a purpose to require a taxpayer to indulge in the idle and wasteful ceremony of filing a statement of an election the existence of which he steadfastly refused to recognize".

and observed,

> "... it would be rationally offensive to make provision for the time and manner of the filing of a statement of election by one in whom it is asserted, the right to make an election does not reside; and to whom the right to make the election is denied." (App. 32).

What seemed absurd to the district court was logic for the court below. The court of appeals held that, for purposes of deciding whether a retail method taxpayer had a right of election prior to amendment in 1948 of the original LIFO regulation, a court may give the regulation a different meaning than that which the Commissioner in 1942-1948 had intended and interpreted it to have.

The court of appeals believed it could justify this conclusion by looking to the first sentence of the LIFO regulation

(Regulations 103, Section 19.22(d)-1), which states that the LIFO regulation is applicable to all taxpayers permitted or required to take inventories under the general inventory provision of the Code (Section 22(c)) and under the general inventory regulation (Regulations 103, Section 19.22(c)). The court then looked to that subsection of the general inventory regulation which authorizes use of the retail method (subsection 19.22(c)-8), and concluded, without more, that the LIFO regulation had always been applicable to retail method taxpayers.

That reasoning ignores and gives no effect to the fact that the Commissioner had always intended and interpreted the original LIFO regulation to bar retail method taxpayers from electing the LIFO method. But, in the view of the court of appeals, that "rationally offensive" gap is of no concern, since collocations of certain words in the original LIFO regulation also appear in the LIFO statute—hence, the original LIFO regulation should be construed to have meant in the period 1942-1948 what the Tax Court in *Hutzler* held the LIFO statute to mean in 1947.

REASONS FOR GRANTING THE WRIT

I

The questions presented in this case are of importance in the administration of federal tax law and administrative law generally and have not been, but should be, decided by this Court.

(a) Throughout the United States there are, the Government has announced, a host of cases, identical with the instant case, in which

> "... claims [are at stake] estimated variously between $300,000,000.00 and one billion dollars." (App. 89-90)

The claims of Macy alone aggregate approximately $12,000,000. Thus, in its most narrow terms, the case is extremely important [see, *United States* v. *Zazove*, 334 U. S. 602]. Its review by this Court would furnish the rule for decision of the companion cases.

(b) It is not disputed that Congress intended to accord retail method taxpayers (like Macy) the right to elect LIFO. As is apparent from the enormous dollar total of similar pending claims, the vast majority of retail method taxpayers have been forced to seek to establish that right of election through litigation and, if the decision below is permitted to stand, will have lost that statutory right. Thus, the net result of the Commissioner's administration of the Congressional purpose through the original LIFO regulation, coupled with the rule of the decision below, will be to limit the statutory right to but a handful of a class of taxpayers that Congress intended to benefit. Where an inferior federal court cannot perceive precepts to prevent such a disparity between Congressional intention and administrative product, an important question of federal law is presented, review of which by this Court is necessary and appropriate.

(c) The decision below is also important in federal law because of the erroneous methodology of its approach to the interpretation of an administrative regulation. The Government urged below, and the court of appeals agreed, that, for purposes of determining whether in 1942-1948 the LIFO regulation prescribed the time and manner for retail method taxpayers to elect LIFO, it did not matter that the Commissioner in that period had misinterpreted the statute to deny them that right and, of course, similarly had intended and interpreted his regulation to deny it. According to the court below, what did matter was that the Commissioner had employed in drafting his regula-

tion many of the same word arrangements that Congress had used in drafting the statute. Hence, the problem of interpreting the regulation as of 1942-1948 became very simple, *viz.*, it must then have had the same meaning which the Tax Court in *Hutzler* held the statute to have. Thus, the "true" meaning (as contrasted with the Commissioner's own interpretation) of the regulation had always existed as a brooding omnipresence which accorded Macy and others a meaningful opportunity to exercise their statutory right to elect LIFO.*

It is well established that courts, to find the meaning of a federal administrative regulation, must look to the administrator's intention and interpretation when prescribing and administering the regulation. *Bowles v. Seminole Rock Co.*, 325 U. S. 410. Clearly, it is an important question whether persons affected by a federal administrative regulation may refer to that same source to seek the meaning of that regulation. To deny them that right can only proliferate administrative and judicial litigation.

II

The court below has decided important questions of federal law in a way that (i) is in conflict with decisions of another court of appeals and the Court of Claims on similar matters [*Pictorial Review Co. v. Helvering*, 68 F. 2d 760 (D. C. Cir. 1934); *Joseph Horne Co. v. United States*, 161 F. Supp. 580 (Ct. Cl. 1958)] and (ii) probably is in conflict with an applicable decision of this Court [*Manhattan Co. v. Commissioner*, 297 U. S. 129].

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*Contrast Judge Clark's acceptance of the methodology urged below by the Government with his rejection of that same methodology in Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 Yale L. J. 267, 274-75 (1946).

(a) *Pictorial Review Co.* v. *Helvering*, 68 F. 2d 766 (D. C. Cir. 1934). The revenue statute involved in this case allowed affiliated corporations within the meaning of the statute to file either separate or consolidated returns, such election to be irrevocable. The Commissioner erroneously construed the statute and promulgated regulations in 1924 which precluded Excella Corporation from joining in a consolidated return with its affiliated group. Three years later, the Commissioner, recognizing his incorrect construction of the statute, amended the original regulations so that Excella qualified to elect to file as a member of its group. Excella so elected, and, thereafter, its affiliated group filed an amended return for 1924, claiming refund. The Commissioner resisted the claim on the ground that Excella had not made a timely election for 1924. The Court of Appeals for the District of Columbia Circuit sustained the election, holding (i) that, not until the initial regulations had been amended to conform to the statute did Excella's right of election come into being and (ii) that the failure of Excella to challenge the initial regulations did not bar its right of election.

The single distinction between *Pictorial Review* and the instant case is that, in the former, the Commissioner's erroneous interpretation of the statute was specifically expressed in his original regulation whereas, in the instant case, the Commissioner's erroneous interpretation of the statute was embodied in the original LIFO regulation primarily through his use in that regulation of the same arrangements of words which he had misconstrued in the statute.

The issue in both cases is at what point in time the regulation made the statutory right of election available to the taxpayer. The single distinction, if any, *i.e.*, the fortuity of the Commissioner's choice of language in his

original regulation, does not provide a rational basis for a difference in result.

Moreover, the bar in the original LIFO regulation to the election of LIFO by retail method taxpayers was no less explicit than the bar to election by Excella under the original consolidated return regulations. The original LIFO regulation required matching of goods (Regulations 103, Section 19.22(d)(2); App. 69-74), impossible for a retail method taxpayer, and omitted provisions for departmentalization of inventories and for use of price indices, provisions necessary for application of LIFO to the retail method. In 1948, the Commissioner found it necessary, not only to provide for departmentalization and for price indices, but also to exempt retail method taxpayers from complying with the matching of goods requirement. (See T. D. 5605, 1948-1 Cum. Bull. 16; App. 79-83.)

(b) *Joseph Horne Co. v. United States*, 161 F. Supp. 580 (Ct. Cl. 1958). This case involved the timeliness of an election of involuntary liquidation under Section 22(d)(6) of the Code. It was essential to decision in the case for the Court of Claims to determine the applicability of the original LIFO regulation to retail method taxpayers.

In holding for the taxpayer in *Horne*, the Court of Claims found that:

> "... until 1948, when the Commissioner amended his regulations, he was erroneously maintaining by *regulations* and practice the position that the LIFO method could not be used by department stores and others using the retail inventory method. *There were no regulations* or rulings prescribing procedures or standards to be followed by such taxpayers in computing their inventory valuations under the LIFO method." (emphasis supplied) [R. 115b]

On the other hand, the court below held that

> "... the whole regulation which the Commissioner issued to govern the use of LIFO was [ap-

> plicable to] . . . a taxpayer using the retail method of inventory valuation. . . ." [App. 7]

After the denial of rehearing below, the Government moved the Court of Claims for rehearing in *Horne*, and urged that the

> ". . . Court's opinion and findings [as to the applicability of the original LIFO regulations to retail method taxpayers] . . . are contrary to and conflict with a more recent decision relating to the same matters, *R. H. Macy & Co.* v. *United States* (C. A. 2d), decided May 12, 1958. . . ."*

The court below, in denying the Macy petition for rehearing, refused to recognize the basis of decision and the scope of the findings in the *Horne* case. Where *Horne* had found that, prior to 1948, there was no LIFO regulation applicable to retail method taxpayers, the court below answered the conflict with *Horne* merely be reiterating its conclusion that the original LIFO regulation did not preclude the filing of a LIFO return. Thus, the opinion below on rehearing does no more than emphasize the correctness of the Government's contention in *Horne* and petitioner's contention here that the decision below is in conflict with the decision of the Court of Claims in *Horne*.

(c) *Manhattan Co.* v. *Commissioner*, 297 U. S. 129. Misconstruing a section of the revenue statute, the Commissioner promulgated a regulation respecting methods of allocating the basis of securities acquired in non-taxable reorganizations. That erroneous regulation was in effect during the taxable year in issue. Thereafter, the Commissioner, discovering his error, amended the regulation to comply with Congressional intent. The case posed the ques-

*Defendant's Motion for a Rehearing, etc., *Joseph Horne Co.* v. *United States*, No. 141-54, Court of Claims, June 6, 1958.

tion whether the amount of the loss claimed by the taxpayer should be determined under the original or the amended regulation. This Court held that the original regulation was not efficacious to create any rights under the statute since a regulation which "... operates to create a rule out of harmony with the statute, is a mere nullity." (297 U. S. at 134.)

In rejecting the taxpayer's contention that the original rather than the amended regulation applied, this Court stated:

> "... the amended regulation, in effect became the primary and controlling rule in respect of the situation presented. It pointed the way, for the first time, for correctly applying the antecedent statute to a situation which arose under the statute. See *Titsworth* v. *Commissioner of Internal Revenue* (C. A. 3d) 73 F. (2d) 385, 386. The statute defines the rights of the taxpayer and fixes a standard by which such rights are to be measured. The regulation constitutes only a step in the administrative process. It does not, and could not, alter the statute ..." (*Id.* at 135.)

Thus, this Court held that promulgation by the Commissioner of an erroneous regulation cannot bar rights (the Commissioner's and, presumably, a taxpayer's) accorded by Congress and that the Commissioner's subsequent promulgation of a valid regulation is the first point in time at which statutory rights dependent on a regulation become fixed.

Applying the *Manhattan Co.* doctrine to the instant case, it is clear that the original LIFO regulation was, as to retail method taxpayers, invalid because under that regulation LIFO was denied to those taxpayers in the face of a statute which accorded LIFO to all taxpayers. In the *Manhattan Co.* case, the Commissioner's regulation on its face contradicted the statute; the statutory contradiction of the

original LIFO regulation, while not as apparent on its face (because, in part, it employed word arrangements from the LIFO statute), is no less real.* Any such distinction is obviously *de minimis*. Hence, as to retail method taxpayers, the first valid LIFO regulation was prescribed in 1948, when the Commissioner amended and reinterpreted the original LIFO regulation.

The absurd result of the decision below is that the Commissioner was able to promulgate a LIFO regulation in 1948 which, for the first time, was applicable to retail method taxpayers and to incorporate in that 1948 regulation a 1943 cut-off date, also applicable to those taxpayers. Clearly, the Commissioner could not have promulgated in 1942 a regulation fixing 1937 as the bar date; no more could he promulgate a regulation in 1948 fixing 1943 as a bar date. Any other conclusion frustrates the Congressional intent because it effectively destroys the right accorded retail method taxpayers to elect LIFO. The only alternative to reading the decision below as countenancing just such a result is to conclude that it conflicts with the principles laid down by this Court in the *Manhattan Co.* case.**

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*Nor can the government suggest a further distinction from the *Manhattan Co.* case by contending that its principles must be inapplicable here because to apply them would accord Macy "the benefit of six years' hindsight in deciding whether or not to elect LIFO for the fiscal year 1942" (App. 11). That suggestion assumes that Macy's filing of a Treasury Form 970 prior to March 10, 1943 would have lent it those six years of hindsight. This is simply not so. Each of the majority retail method taxpayers who did file Treasury Form 970 enjoyed the very same delay in making a binding election of LIFO, *i.e.*, at any time prior to the decision of the Tax Court in *Hutzler*, those taxpayers could have rescinded their election of LIFO by acquiescing in the Commissioner's pre-1948 interpretation of both statute and regulation.

**The principles of the *Manhattan Co.* case are not only of consuming importance in the tax field but also in the field of administrative law generally; for some non-tax cases, see, *e.g.*, *Woods v. Hyman Hotel Co.*, 177 F. 2d 543, 547 (8th Cir. 1949); *Martin v. Porter*, 157 F. 2d 35, 40 (9th Cir. 1946); and *Fleming v. Farmers Peanut Co.*, 128 F. 2d 404, 407 (5th Cir. 1942).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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